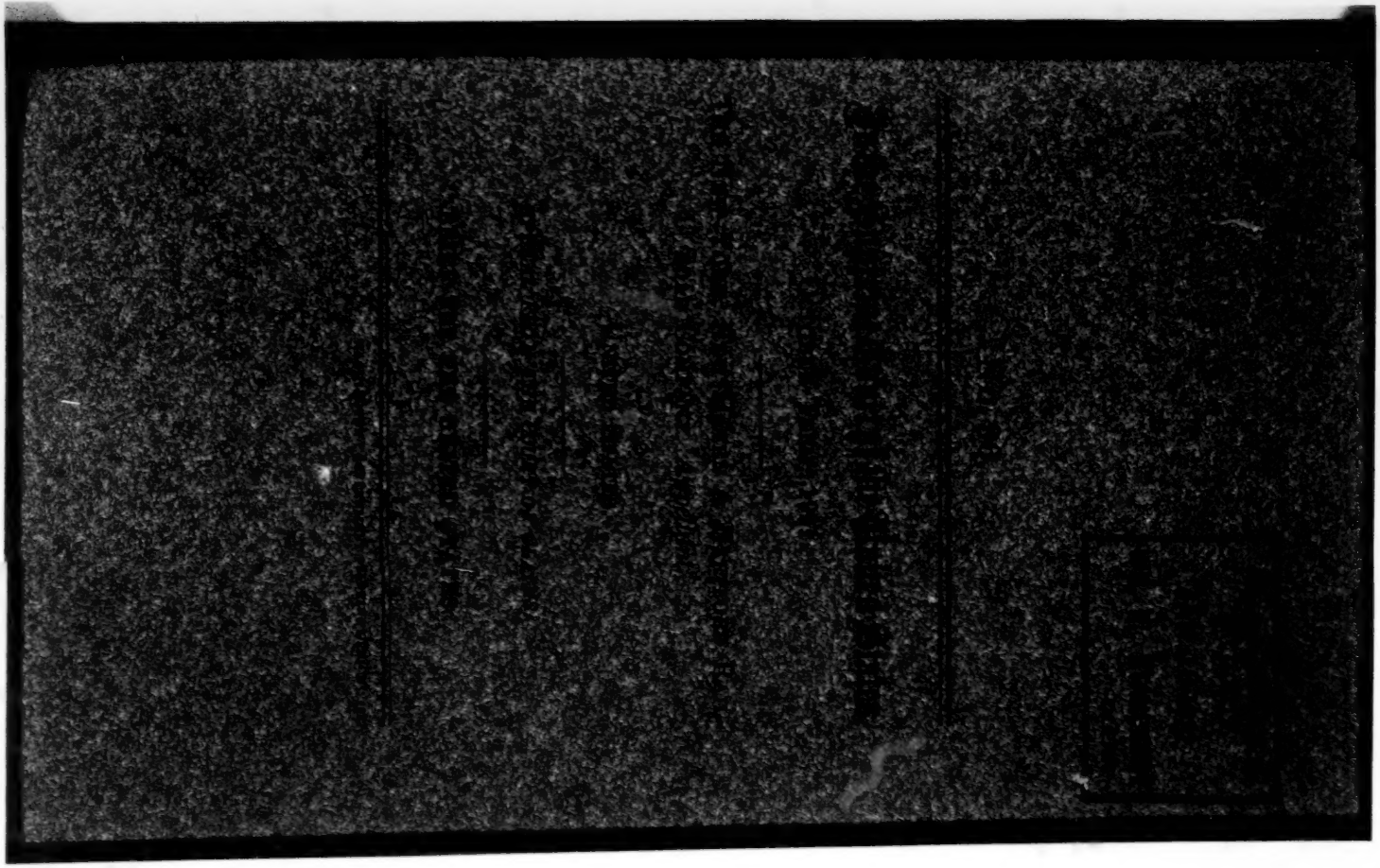

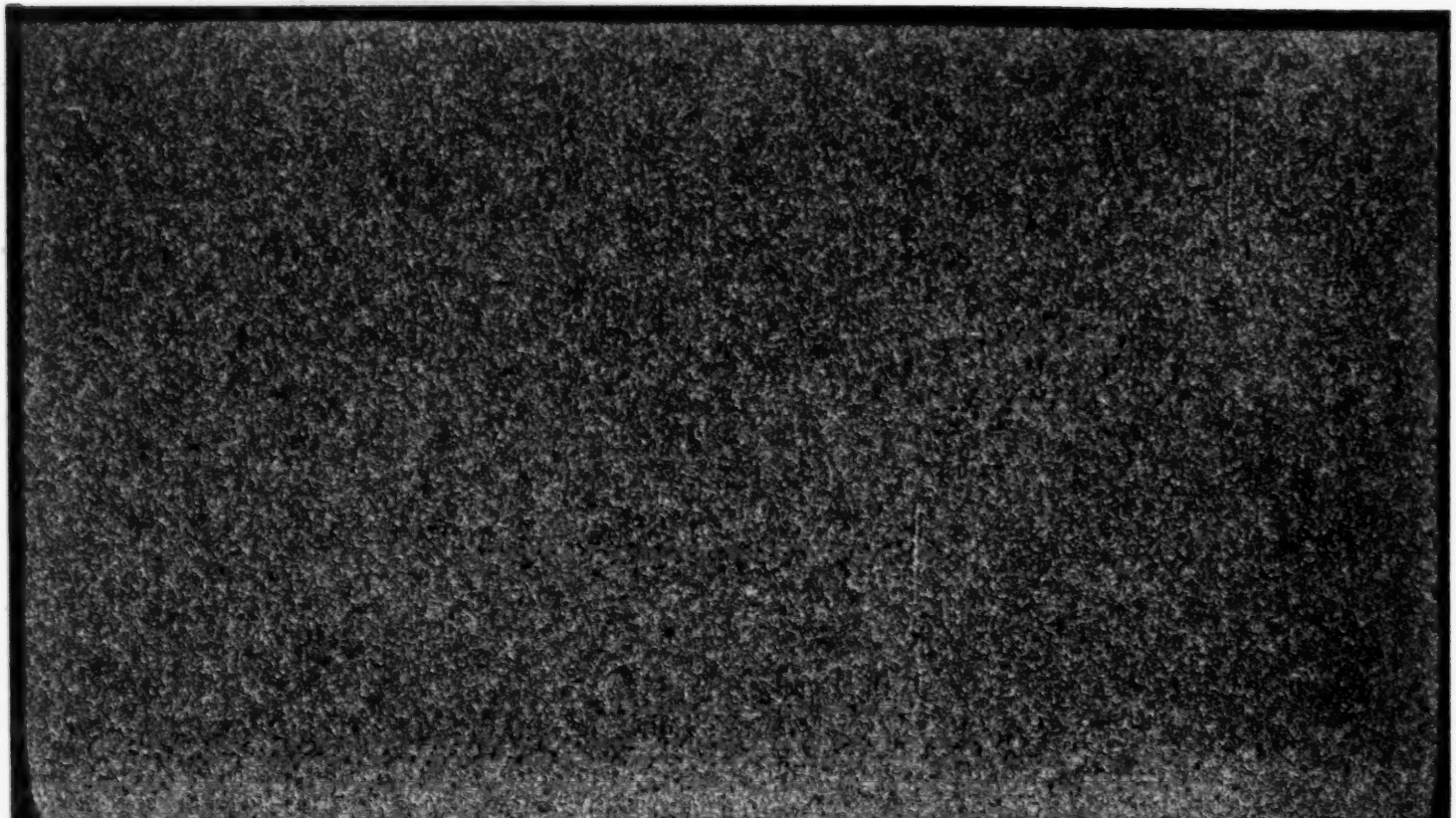

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE NEW YORK, NEW HAVEN & HARTFORD Railroad Company, *Appellant*, *v.* UNITED STATES. } No. 96.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On October 23, 1914, the Treasury Department at the United States Mint in Philadelphia delivered to the Post Office Department 1,000 bags, each containing $5,000 in gold and weighing 18¾ pounds, for transmission to Boston by mail (Tr. 13).

The bags were sealed at the mint before delivery to the postal authorities and were placed in 167 mail pouches which were locked with rotary mail locks and labeled "Boston, Mass." Postage of $420 was prepaid by the Treasury as the amount required for fourth-class mail matter at parcel-post rates (Tr. 13).

The Post Office Department received and treated the bags as mail matter of the fourth class, which

were placed in a storage mail car in which through mails inclosed in pouches and sacks are deposited and transported between stated points, in which no distribution of the mails is performed, and which may be either a car specially equipped with stanchions for the separation of the made-up mails according to destinations, or an ordinary baggage car (Tr. 13).

Five railway mail officials and postal clerks, who held the regular travel commissions for carriage over the railroad, accompanied the car from Philadelphia to New York in New York and Pittsburgh R. P. O. train No. 34 of the Pennsylvania Railroad. On arrival at New York the 167 pouches were placed in a vault at the subtreasury (Tr. 13).

On October 24, 1914, the chief clerk of the Railway Mail Service, subject to whose call the pouches were, and other railway mail officials took the 167 pouches in auto mail trucks from the subtreasury to the Grand Central Station and placed them in postal car of Boston, Springfield and New York R. P. O., which was attached to regular passenger train No. 50 of New York, New Haven & Hartford Railroad Company, which was by the latter carried to Springfield, Mass., over postal routes Nos. 106004 and 106005; thence to Boston over the Boston & Albany Railroad (New York Central, lessee), accompanied by seven officials of the Railway Mail Service, all holding the regular travel commissions for carriage over the routes as prescribed by law.

On November 14, 1913, the Postmaster General, in accordance with the act of March 4, 1913, increased

the company's compensation for the transportation of mails on route 106005, at the rate of $2,595.03 per annum, being $42.9144 per mile for 60.47 miles and 5 per cent increase fixed by readjustment from July 1, 1913, based on weighing from September 4 to December 17, 1912, inclusive, which made the total compensation thereafter at the rate of $54,495.82 per annum, or $901.2043 per mile for 60.47 miles (Tr. 12).

On December 4, 1913, the Postmaster General, in accordance with the act of March 4, 1913, increased the company's compensation for the transportation of mails on route 106004, at the rate of $17,211.57 per annum, being $75.1105 per mile for 229.15 miles; and 5 per cent increase fixed by readjustment from July 1, 1913, based on weighing from September 4 to December 17, 1912, inclusive, which made the total compensation thereafter at the rate of $361,442.99 per annum, or $1,577.3205 per mile for 229.15 miles (Tr. 12).

In each instance the increase was based upon an ascertainment by an estimate of the increased weight of mails resulting from the establishment of the parcel post, and the company was in each instance notified on the same day (Tr. 13).

Without protest the company accepted and the Government paid the amount fixed by the readjustment orders for carrying the mails over the routes indicated and neither the Pennsylvania nor Boston & Albany companies has ever presented a similar or any claim growing out of the same transaction (Tr. 14).

Without even the semblance of any allegation of deception, misrepresentation, or fraud, and without any denial whatever of any lack of knowledge on the part of the company, its officers and agents, of the nature of the transaction, or of any protest whatever on their part that the appellant was under no obligation to receive and transport the gold as mail, but in a petition in general terms they now claim they had no contract "as to the price or the value of the services for said shipment of gold coin" or for the men accompanying the same (Tr. 3), and that they are entitled to compensation on the basis of express rates, i. e., the proper proportion of the through joint express rate, $1 for each $1,000 between New York and Springfield, or $5,000, and seven passenger fares, $2.95 each, or $20.65, total, $5,020.65 (Tr. 3).

ARGUMENT.

I.

THE GOLD COIN WAS MAILABLE.

A. THE STATUTES AND THE FINDINGS OF THE COURT OF CLAIMS ESTABLISH THAT THE GOLD COIN WAS FOURTH-CLASS MAIL MATTER.

Concerning the nature of the action counsel say (Br. 6) "It is an action for the transportation of express matter not included by law or by any rule or regulation of the Post Office Department within the classifications of mail matter. * * * The appellant in this case is not asking for additional pay for hauling the mails. Its rights in such a case were foreclosed by the decision of this court in the case of *New Haven Railroad Company* v. *the*

United States (251 U. S. 23); and no such claim is repeated in this action."

Again, counsel say (Br. 10): "From these facts it is plain that the shipment of gold coin in packages of 18.75 pounds, which were not mail matter *at all of any kind*, and were not included within the contract with the appellant, or within the compensation paid for carrying the mails."

Thus counsel for the appellant would seem to indicate that the gold coins were unmailable.

Such an argument is contrary to the statutes, the opinions of this court construing the same, and the long-established practice.

Section 8 of the act of August 24, 1912 (37 Stat. 539, 557), provides:

> SEC. 8. That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second, or third class, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery.

The act further provides, for carrying out the purposes of section 8, the United States and its several Territories and possessions, except the Philippine Islands, should be divided into eight postal

zones, which, by direction of the Postmaster General, were accordingly established as therein provided.

The act of March 4, 1913 (37 Stat. 791, 797), provides:

> That on account of the increased weight of mails resulting from the enactment of section eight of the act of August twenty-fourth, nineteen hundred and twelve, making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding five per centum thereof per annum, excepting upon routes weighed since January first, nineteen hundred and thirteen, and to be readjusted from July first, nineteen hundred and thirteen, until otherwise provided by law.

The Court of Claims found (Tr. 11):

> The Postmaster General, on July 25, 1913, reclassified and re-formed the weight limit of parcel-post packages for transportation in the first and second zones by increasing the weight limit from 11 to 20 pounds, and on December 18, 1913, by increasing the weight limit in all zones from 11 to 20 pounds, and in the first and second zones by increasing the weight limit from 20 to 50 pounds. On July 25, 1913, the rates of postage on parcels exceeding 4 ounces in weight for delivery in the first and second zones were fixed at 5 cents for the first

pound and 1 cent for each additional pound or fraction thereof.

On December 6, 1913, for delivery in the third zone the rates of postage were fixed at 6 cents for the first pound and 2 cents for each additional pound or fraction thereof; for the fourth zone at 7 cents for the first pound and 4 cents for each additional pound or fraction thereof; for the fifth zone at 8 cents for the first pound and 6 cents for each additional pound or fraction thereof; and for the sixth zone at 9 cents for the first pound and 8 cents for each additional pound or fraction thereof.

The plaintiff, on August 15, 1913, in a letter to the Post Office Department, protested against the increase in weight of parcel-post packages and reserved the right to decline to carry the additional mail matter without additional compensation.

On August 22, 1913, the Second Assistant Postmaster General replied that the plaintiff, under the law, if he continued to carry the mails, was not entitled to additional compensation.

The bags of coin were placed in mail pouches. These pouches were locked with rotary mail locks and labeled "Boston, Mass." The postage was prepaid on fourth-class mail matter at parcel-post rates. The Post Office Department received at Philadelphia the bags as fourth-class mail matter. The pouches were placed in a storage mail car. The car moved in New York and Pittsburgh U. P. O. train No. 34 of the Pennsylvania Railroad. The car was accompanied

by five railway mail officials and postal clerks from Philadelphia to New York, all of whom held the regular travel commissions used in such cases.

Section 881, sub No. 2, of the Postal Rules and Regulations of 1913, cited by appellant (Br. 12), makes gold coin mailable matter.

Gold coin is not unmailable under the Postal Laws (secs. 479–486, P. L. & R., ed. 1913), and "what matter should be absolutely excluded from the mails" is within the jurisdiction of the Second Assistant Postmaster General (sec. 471, P. L. & R., ed. 1913).

The matter of wrapping and securing fourth-class mail matter for transportation purposes is also for the benefit of the service (sec. 469, id.; 472 to 475, id.).

Congress by legislation has long since established the policy of intrusting money and valuables to the mails.

Section 3926, R. S. (17 Stat. 300, June 8, 1872), authorizes the Postmaster General to establish a uniform system of registration "for the greater security of valuable mail matter."

Section 3932, R. S. (17 Stat. 307, June 8, 1872), provides for the transmission by registered mail of certain currencies of the United States without the payment of registry fees.

Title VI of the Postal Laws and Regulations, 1913, sets forth in detail the numerous regulations of the department relating to such registry service.

The Postmaster General, in his annual report to Congress for 1909, page 335, shows by a table the amount of money and money values belonging to the

United States transmitted during the fiscal year, consisting of postal funds, surplus money-order funds, postage stamps, and stamped envelopes, money sent and received by the Secretary of the Treasury, the Register of the Treasury, Commissioner of Internal Revenue, Comptroller of Currency, Auditor for the Post Office Department, the Treasurer of the United States, and the Assistant Treasurer of the United States aggregating $2,353,840,251. The report for 1910, page 315, shows $2,392,543,234. The report for 1911, page 353, shows $3,002,215,452. The report for 1912, page 297, shows $3,464,980,987. The report for 1913, page 346, shows $2,891,578,735. Further argument would seem unnecessary that gold coin is mailable.

Counsel further say (Br. 14): "If the railroad company had known that such a shipment of gold coins was to be made on October 24, 1914, and had positively refused to transport the same, neither the Secretary of the Treasury nor the Postmaster General could have compelled the performance of this service by a writ of mandamus, or any other process of court. If the appellant had on that date known of the prospective shipment, and then had refused to transport the same as mail matter, it could not be said that an action would lie against the appellant for violation of its contract, as set out in the distance circular of July 1, 1913."

It is not clear that the foregoing statement is intended to convey that appellant, its officers and

agents, had no knowledge of this transaction until after it was consummated. There is no such allegation in the petition. Moreover, it is inconceivable that the Post Office Department could deliver to appellant and the latter receive 167 mail pouches containing 1,000 bags, each bag containing $5,000 in gold and each weighing 18¾ pounds, without some previous arrangement between the department and appellant for the placing of the mail storage car and the loading thereof before the departure of the train. In any case, postal car of Boston, Springfield, and New York R. P. O. appears to have been ready when two or more auto mail trucks reached the Grand Central Station and the 167 pouches were transferred from the trucks into the mail car. That done, seven able-bodied men, holding the requisite travel commissions from the Postmaster General, accompanied the car which moved out over appellant's railroad over postal routes Nos. 106004 and 106005 to Springfield, Mass. (Tr. 13).

That appellant, through its officers and agents, was aware of the nature of the article transported must be assumed as a fact in this case.

B. THE CONTRACT BETWEEN APPELLANT AND THE POSTMASTER GENERAL INCLUDED THE SHIPMENT OF GOLD COIN AS PARCEL-POST MATTER.

To escape the findings of the Court of Claims, counsel for appellant simply argue that the gold was unmailable and therefore not within the contract which existed between appellant and the Postmaster General. As the gold was mailable, the contention fails.

C. THE RECEIVING AND TRANSPORTING THE GOLD AS FOURTH-CLASS MAIL MATTER WITHOUT PROTEST AND ACCEPTING ITS REGULAR COMPENSATION FOR TRANSPORTING THE MAILS CONSTITUTES AN ESTOPPEL AGAINST WHICH APPELLANT MAY NOT PREVAIL.

In receiving and transporting the pouches containing the gold as fourth-class mail matter and accepting compensation from the Postmaster General without protest, appellant is well within the adjudicated cases which hold it is not entitled to recover.

The Court of Claims dismissed the petition on the authority of *N. Y., N. H. & H. R. R. Co.* v. *United States*, 53 C. Cls. 222; 251 U. S. 123; *Mail Divisor Cases*, 53 C. Cls. 258; 251 U. S. 326. (Tr. 14).

In the *Mail Divisor Cases*, 251 U. S. 326, 339, Mr. Justice Pitney, with whom concurred Mr. Justice McKenna, in an opinion concurring in the affirmance of the judgment, but upon somewhat different grounds than those expressed in the opinion of Mr. Justice Holmes, said:

> From the findings of the Court of Claims it appears that in all of these cases there were express contracts; and I concur in the view of that court (53 Ct. Cls. 258, 308, 315, 318, 319) that the contracts arose not out of the Distance Circular, in which the Postmaster General specially called notice to Order No. 412, and to which some of the claimants responded with protests, more or less explicit, that they would not be bound by that order, but arose out of what subsequently happened. The Postmaster General in every case informed the protesting carriers that he would not enter into contract with any railroad company excepting

it from the operation of any postal law or regulation. The mails were weighed and the average weight ascertained in accordance with Order No. 412, as all the claimants had been notified would be done; thereafter the Postmaster General, upon the basis of the weight thus ascertained, caused the maximum statutory rate to be calculated, issued orders naming certain amounts thus arrived at as the compensation for the service, and gave notice in proper form to the carriers specifying in terms the readjusted pay that would be allowed, "subject to future orders and to fines and deductions." Thereafter the carriers received and transported the mails as offered, periodically accepted compensation in accordance with the readjustment notices, and proceeded thus without further objection or protest until the end of the respective quadrennial periods. In short, although in some cases they declared they would not consent to the ascertainment of average weights on the basis of Order No. 412, they did not insist upon their objection in the face of the Postmaster General's declaration that he would not accede to it. * * *

I deem it clear, therefore, that the claimants in fact accepted the Postmaster General's offers as contained in the readjustment notices, by proceeding to perform the prescribed service in accordance therewith and accepting the compensation due to them therefor. And so the Court of Claims held (53 Ct. Cls. 258, 308, 313, 315, 318, 319).

In *N. Y., N. H. & H. R. R. Co.* v. *United States*, 251 U. S. 123, 126, 127, the original petition, as shown

by the records in this court (No. 74, October term, 1919) filed June 28, 1915, as amended January 26, 1917, with respect to certain actions of the Postmaster General, alleged:

> * * * he has made greater and more expensive demands as to rooms in stations for handling the mails; he has made many and extensive demands in the handling and the disposition of the mails at the several stations along the lines of the railroad, and in the transportation of the mails between the stations and the post offices not more than 80 rods therefrom; he has required the hauling of vast amounts of gold coin as mail of the fourth-class in violation of law and without compensation to the carriers; he has required the carrying of mail on limited trains, * * *."

Mr. Justice McReynolds, in delivering the opinion of the court, said:

> Concerning the challenged interpretation and application of sec. 4002, Rev. Stats., resulting in payments during each four-year term upon the basis of weights taken immediately prior to the beginning of the same instead of annually, it suffices to say that the action taken accords with prior practice followed for many years; the letter of the statute permits it; the carrier submitted with full knowledge; and, impliedly at least, it was sanctioned by this court in *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 249 U. S. 385.
>
> We think it must be treated as settled doctrine that prior to the act of July 28, 1916, c. 261, 39 Stat. 412, 429—with the exception

of certain roads aided by land grants—railroads were not required by law to carry the mails. *Eastern R. R. Co.* v. *United States*, 129 U. S. 391, 394; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650; *Delaware, Lackawanna & Western R. R. Co.* v. *United States, supra*. And as appellant voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it can not now claim an implied contract for a greater sum. It may be that any railroad by failing to carry the mails would incur the hostility of those living along its lines and as a consequence suffer serious financial losses; but the fear of such results certainly does not amount to compulsion by the United States and can not constitute the basis of a justiciable claim against them for taking property.

D. APPELLANT PERFORMED NO EXPRESS SERVICE.

Counsel maintain that as the gold was unmailable appellant is entitled to express rates for carrying the mail pouches containing the gold in a railway post-office car in charge of seven men who accompanied the shipment, for whose transportation it also claims the regular passenger fares.

The men were not regular passengers on the train but custodians of the gold. They did not travel on regular tickets but on travel commissions. If they were in the mail car, they certainly did not get the benefit of the comforts and conveniences of a passenger car. As to the gold, as the company performed only the service of transporting fourth-class mail matter, it is not entitled to express rates. The case would be different if the gold had been trans-

ported by express and the compensation adjusted on the basis of fourth-class mail, or if the men had traveled as passengers and had paid only the regular travel commission fares.

Equally without merit is the argument that the pouches were not stamped according to law or that the Postal Rules and Regulations may not otherwise have been complied with. The Government itself was handling the coin and the ordinary rules and regulations which apply to non-Government transactions need not strictly apply to the Government. Nor is the manner in which the pouches were stamped or otherwise marked the complaint of the appellant. After receiving, transporting, delivering, and accepting compensation for the transportation of the gold as fourth-class mail matter without protest of any kind the attempt to recover express rates and passenger fares for the transportation of the gold and the men is a belated afterthought.

It is noteworthy that neither the Pennsylvania Railroad nor the Boston & Albany has filed any petition or otherwise presented any claim against the Government for or on account of this transaction.

The judgment of the Court of Claims dismissing the petition should be affirmed.

JAMES M. BECK,
Solicitor General,
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
JANUARY, 1922.